

IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT

DOCKET FILE COPY ORIGINAL

The Public Utilities Commission of Ohio

Petitioner,

Case No. \_\_\_\_\_

v.

Appeal from the Federal  
Communications Commission

Federal Communications Commission  
And United States of America,

Respondents.

*In the Matter of Vonage Holdings  
Corporation Petition for  
Declaratory Ruling Concerning an  
Order of the Minnesota Public  
Utilities Commission  
WC Docket No. 03-211*

**PETITION FOR REVIEW**

Pursuant to 47 U.S.C. §402(a), 28 U.S.C. §§ 2342 and 2344, and Rule 15(a) of the Federal Rules of Appellate Procedure, the Public Utilities Commission of Ohio petitions this Court for review of the Memorandum Opinion and Order ("Order") of the Federal Communications Commission ("Commission") in *In the Matter of Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, WC Docket No. 03-211. A copy of the Memorandum Opinion and Order released November 12, 2004 is attached to this pleading and designated as "Appendix A." Venue is properly placed in this Court in accordance with 28 U.S.C. § 2343.

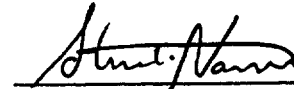
Petitioner seeks an order and judgment that the Commission's order is in excess of the Commission's statutory jurisdiction, authority, or limitations, or short of statutory

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right, 5 U.S.C. § 706(2)(C); and is arbitrary, capricious, an abuse of discretion and otherwise contrary to law, 5 U.S.C. § 706(2)(A).

Respectfully submitted,

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January 7, 2005

## APPENDIX A

Source: Legal > Area of Law - By Topic > Communications > Multi-Source Groups > **Federal Communications Cases & Federal Communications Commission Decisions** [i]

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*19 FCC Rcd 22404; 2004 FCC LEXIS 6429, \**

In the Matter of Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission

WC Docket No. 03-211

FEDERAL COMMUNICATIONS COMMISSION

19 FCC Rcd 22404; 2004 FCC LEXIS 6429

**RELEASE-NUMBER: FCC 04-267**

November 12, 2004, Released; November 9, 2004, Adopted

**ACTION: [\*1] MEMORANDUM OPINION AND ORDER**

**JUDGES:**

By the Commission: Chairman Powell and Commissioner Abernathy issuing separate statements; Commissioners Copps and Adelstein concurring and issuing separate statements.

**OPINION:**

**I. INTRODUCTION**

1. In this Memorandum Opinion and Order (Order), we preempt an order of the Minnesota Public Utilities Commission (Minnesota Commission) applying its traditional "telephone company" regulations to Vonage's DigitalVoice service, which provides voice over Internet protocol (VoIP) service and other communications capabilities. We conclude that DigitalVoice cannot be separated into interstate and intrastate communications for compliance with Minnesota's requirements without negating valid federal policies and rules. In so doing, we add to the regulatory certainty we began building with other orders adopted this year regarding VoIP -- the *Pulver Declaratory Ruling* n1 and the *AT&T Declaratory Ruling* n2 -- by making clear that this Commission, not the state commissions, has the responsibility and obligation to decide whether certain regulations apply to DigitalVoice and other IP-enabled services having the same capabilities. For such services, comparable regulations [\*2] of other states must likewise yield to important federal objectives. Similarly, to the extent that other VoIP services are not the same as Vonage's but share similar basic characteristics, we believe it highly unlikely that the Commission would fail to preempt state regulation of those services to the same extent. n3 We express no opinion here on the applicability to Vonage of Minnesota's general laws governing entities conducting business within the state, such as laws concerning taxation; fraud; general commercial dealings; and marketing, advertising, and other business practices. We expect, however, that as we move forward in establishing policy and rules for DigitalVoice and other IP-enabled services, states will continue to play their vital role in protecting consumers from fraud, enforcing fair business practices, for example, in advertising and billing, and generally responding to consumer inquiries and complaints.

n1 *Petition for Declaratory Ruling that pulver.com's Free World Dialup is Neither*

*Telecommunications Nor a Telecommunications Service*, WC Docket No. 03-45, Memorandum Opinion and Order, 19 FCC Rcd 3307 (2004) (*Pulver Declaratory Ruling or Pulver*). [**\*3**]

n2 *Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, WC Docket No. 02-361, Order, 19 FCC Rcd 7457 (2004) (*AT&T Declaratory Ruling*).

n3 See *infra* para. 31 and notes 93, 113 (referring to VoIP services of other providers, including facilities-based providers).

2. Our decision today will permit the industry participants and our colleagues at the state commissions to direct their resources toward helping us answer the questions that remain after today's Order -- questions regarding the regulatory obligations of providers of IP-enabled services. We plan to address these questions in our *IP-Enabled Services Proceeding* n4 in a manner that fulfills Congress's directions "to promote the continued development of the Internet" n5 and to "encourage the deployment" of advanced telecommunications capabilities. n6 Meanwhile, this Order clears the way for increased investment and innovation in services like Vonage's to the benefit of American consumers.

n4 *IP-Enabled Services*, WC Docket No. 04-36, Notice of Proposed Rulemaking, 19 FCC Rcd 4863 (2004) (*IP-Enabled Services Proceeding*). [**\*4**]

n5 47 U.S.C. § 230(b)(1).

n6 47 U.S.C. § 157 nt. (incorporating section 706 of the Telecommunications Act of 1996 (1996 Act)).

## **II. BACKGROUND**

3. On September 22, 2003, Vonage filed a petition for declaratory ruling n7 requesting that the Commission preempt an order of the Minnesota Commission imposing regulations applicable to providers of telephone service on Vonage's DigitalVoice. n8

n7 See Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission, WC 03-211 (filed Sept. 22, 2003) (Vonage Petition). The Commission requested and received comment on the Vonage Petition. See *Pleading Cycle Established for Comments on Vonage Petition for Declaratory Ruling*, WC Docket No. 03-211, Public Notice, 18 FCC Rcd 19325 (2003). See Appendix for a list of commenters.

n8 *In the Matter of Complaint of the Minnesota Department of Commerce Against Vonage Holding Corp. Regarding Lack of Authority to Operate in Minnesota*, Docket No. P-6214/C-03-108, Order Finding Jurisdiction and Requiring Compliance (issued Sept. 11, 2003) (*Minnesota Vonage Order*). [**\*5**]

### A. Vonage's DigitalVoice Service

4. DigitalVoice is a service n9 that enables subscribers to originate and receive voice communications and provides a host of other features and capabilities that allow subscribers to manage their personal communications over the Internet. n10 By enabling the sending and receiving of voice communications and providing certain familiar enhancements like voicemail, DigitalVoice resembles the telephone service provided by the circuit-switched network. But as described in detail here, there are fundamental differences between the two types of service.

n9 DigitalVoice provides VoIP, among other capabilities. Although the Commission has adopted no formal definition of "VoIP," we use the term generally to include any IP-enabled services offering real-time, multidirectional voice functionality, including, but not limited to, services that mimic traditional telephony. *See IP-Enabled Services Proceeding*, 19 FCC at 4866, para. 3 n.7. VoIP services are available in a number of different forms. *See, e.g., Minnesota Commission Reply* at 3 ("[VoIP] is a technology that has many current applications and potentially many more future applications."); *see also Availability of Advanced Telecommunications Capability in the United States*, GN Docket No. 04-54, Fourth Report to Congress, FCC 04-208, at 24-26 (rel. Sept. 9, 2004) (*Fourth Section 706 Report*) (describing VoIP services generally). [\*6]

n10 We use the term "Internet" in this Order similarly to how the Commission has used it previously, inclusive of interconnected public, private, managed, and non-managed IP networks. *See, e.g., Pulver*, 19 FCC Rcd at 3309, para. 4 (citing *GTE Telephone Operating Cos., GTE Tariff No. 1, GTOC Transmittal No. 1148*, CC Docket No. 98-79, Memorandum Opinion and Order, 13 FCC Rcd 22466, 22468, para. 5 (1998) (*GTE ADSL Order*)); *see also Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities; Internet Over Cable Declaratory Ruling; Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, GN Docket No. 00-185; CS Docket No. 02-52, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798, 4799 n.1 (2002) (*Cable Modem Declaratory Ruling*), *aff'd in part, vacated in part, and remanded, Brand X Internet Services v. FCC*, 345 F.3d 1120 (9th Cir. 2003), *stay granted pending cert.* (April 9, 2004), *petitions for cert. filed*, Nos. 04-277 (Aug. 30, 2004), 04-281 (Aug. 27, 2004).

5. First, Vonage [\*7] customers must have access to a broadband connection to the Internet to use the service. n11 Because Vonage does not offer Internet access services, DigitalVoice customers must obtain a broadband connection to the Internet from another provider. n12 In marked contrast to traditional circuit-switched telephony, however, it is not relevant where that broadband connection is located or even whether it is the same broadband connection every time the subscriber accesses the service. Rather, Vonage's service is fully portable; customers may use the service anywhere in the world where they can find a broadband connection to the Internet. n13 According to Vonage, it does not know where in the world its users are when using DigitalVoice. n14

n11 See Vonage Petition at 4; Letter from William B. Wilhelm, Jr., Counsel for Vonage, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 03-211, at 2 (filed Oct. 1, 2004) (Vonage Oct. 1 *Ex Parte* Letter) (suggesting a minimum upstream connection speed of 128k).

n12 See Vonage Petition at 7, 15; Vonage Reply at 8. According to Vonage, its service

operates with any type of broadband connection (e.g., cable modem, digital subscriber line, or satellite), but will not work with dial-up Internet access. See Vonage Petition at 4. [\*8]

n13 See Vonage Petition at 4; Vonage Oct. 1 *Ex Parte* Letter at 2.

n14 See Vonage Petition at 2, 5, 28-29.

6. Second, Vonage indicates that DigitalVoice requires customers to use specialized customer premises equipment (CPE). n15 Customers may choose among several different types of specialized CPE: (1) a Multimedia Terminal Adapter (MTA), which contains a digital signal processing unit that performs digital-to-audio and audio-to-digital conversion and has a standard telephone jack connection; (2) a native Internet Protocol (IP) phone; or (3) a personal computer with a microphone and speakers, and software to perform the conversion (softphone). n16 Although customers may in some cases attach conventional telephones to the specialized CPE that transmits and receives these IP packets, a conventional telephone alone will not work with Vonage's service. n17

n15 See *id.* at 5.

n16 See *id.* at 5; Vonage Reply at 8-9; see also 8x8 Comments at 8-10. Vonage states that most of its customers use an MTA. In addition to the CPE to convert voice signals, as a practical matter, most users also require a router. See Vonage Petition at 5.

n17 See Vonage Petition at 5; Vonage Reply at 8 ("An analog telephone device is neither necessary nor sufficient for use with Vonage's service."); see also 8x8 Comments at 9. [\*9]

7. Third, DigitalVoice offers customers a suite of integrated capabilities and features that allows the user to manage personal communications dynamically, including but not limited to real-time, multidirectional voice functionality. n18 In addition to voice, these features include voicemail, three-way calling, online account and voicemail management, and geographically independent "telephone" numbers. n19 Vonage's Real-Time Online Account Management feature allows customers to access their accounts 24 hours a day through an Internet web page to manage their communications by configuring service features, handling voicemail, and editing user information. n20 At the user's discretion, the user may, among other options, play voicemails back through a computer or receive them in e-mails with the actual message attached as a sound file. n21 Using other features, users may request that DigitalVoice ring simultaneously the user's Vonage number plus any other number in the United States or Canada regardless of who provides the service connected with that other number. n22

n18 See Vonage Petition at 4; see also *IP-Enabled Services Proceeding*, 19 FCC Rcd at 4866, para. 3 n.7. [\*10]

n19 See, e.g., Vonage Oct. 1 *Ex Parte* Letter at 4-5; Vonage, *Take Your Number With You* (visited Oct. 28, 2004) <<http://www.vonage.com/features.php?feature=traveling>>.

n20 See Vonage Oct. 1 *Ex Parte* Letter at 4; see also Vonage, *Real-Time Online Account Management* (visited Oct. 28, 2004) <[http://www.vonage.com/features.php?feature=online\\_account\\_mgt](http://www.vonage.com/features.php?feature=online_account_mgt)>. For example, the voicemail service integrated into DigitalVoice allows the user to access voicemail and select delivery options through interaction with the customer's web account on the Internet.

n21 Vonage is currently adding functionality so that users may customize voicemail controls by scheduling recorded greetings for different hours of the day and different days of the year. See Oct. 1 *Ex Parte* Letter at 5; see also Vonage, *Voicemail Plus* (visited Oct. 28, 2004) <<http://www.vonage.com/features.php?feature=voicemail>>.

n22 See, e.g., Vonage, *Call Forwarding* (visited Oct. 28, 2004) <[http://www.vonage.com/features.php?feature=call\\_forwarding](http://www.vonage.com/features.php?feature=call_forwarding)>.

8. Among these features, DigitalVoice provides the capability to originate and terminate real-time voice communications. Once [\*11] the CPE and software are installed and configured, the customer may place or receive calls over the Internet to or from anyone with a telephone number -- including another Vonage customer, a customer of another VoIP provider, a customer of a commercial mobile radio service (CMRS) provider, or a user reachable only through the public switched telephone network (PSTN). n23 In any case, the subscriber's outgoing calls originate on the Internet and are routed over the Internet to Vonage's servers. If the destination is another Vonage customer or a user on a peered service, the server routes the packets to the called party over the Internet and the communication also terminates via the Internet. n24 If the destination is a telephone attached to the PSTN, the server converts the IP packets into appropriate digital audio signals and connects them to the PSTN using the services of telecommunications carriers interconnected to the PSTN. If a PSTN user originates a call to a Vonage customer, the call is connected, using the services of telecommunications carriers interconnected to the PSTN, to the Vonage server, which then converts the audio signals into IP packets and routes them to the Vonage [\*12] user over the Internet. n25 Together, these integrated features and capabilities allow customers to control their communications needs by determining for themselves how, when, and where communications will be sent, received, saved, stored, forwarded, and organized.

n23 See Vonage Petition at 6.

n24 Vonage-to-Vonage calls are not transmitted over the PSTN. See *id.* at 7. Calls from Vonage customers to customers of certain other IP service providers with which Vonage has a peering arrangement also are not transmitted over the PSTN, but solely over the Internet. See Vonage Oct. 1 *Ex Parte* Letter at 3-4. In this respect, the communication is similar to communications that occur over Pulver's Free World Dialup (FWD) service between FWD members. See *Pulver*, 19 FCC Rcd at 3309-10, paras. 5-6. If Vonage does not have a peering arrangement with a particular VoIP provider, calls between users of the two services are routed in part over the PSTN but originate and terminate via the Internet. See Vonage Oct. 1 *Ex Parte* Letter at 4.

n25 See Vonage Petition at 5-8; see also 8x8 Comments at 10.

9. Fourth, although Vonage's [\*13] service uses North American Numbering Plan (NANP)

numbers as the identification mechanism for the user's IP address, the NANP number is not necessarily tied to the user's physical location for either assignment or use, in contrast to most wireline circuit-switched calls. n26 Rather, as Vonage explains, the number correlates to the user's digital signal processor to facilitate the exchange of calls between the Internet and the PSTN using a convenient mechanism with which users are familiar to identify the user's IP address. n27 In other words, and again in marked contrast to traditional circuit-switched telephony, a call to a Vonage customer's NANP number can reach that customer anywhere in the world and does not require the user to remain at a single location.

n26 See Vonage Petition at 8.

n27 For calls to and from other VoIP users, Vonage could choose to use other identifiers to match the IP address. NANP numbers are not necessarily required for VoIP calls that remain on the Internet and do not connect with the PSTN. See *Pulver*, 19 FCC Rcd at 3309, para. 5 (explaining that Pulver's FWD service uses five or six digit FWD identification numbers rather than NANP numbers); see also Vonage Petition at 7-8; Vonage Oct. 1 *Ex Parte* Letter at 3-5. [\*14]

## **B. History of Vonage's Petition**

10. In July 2003, the Minnesota Department of Commerce filed an administrative complaint against Vonage with the Minnesota Commission, asserting that Vonage was providing telephone exchange service in Minnesota and was thus subject to state laws and regulations governing a "telephone company." Among other things, the laws and regulations in question require such companies to obtain operating authority, file tariffs, and provide and fund 911 emergency services. n28 The Minnesota Department of Commerce sought an administrative order from the Minnesota Commission to compel Vonage to comply with these state regulatory requirements. In response to the administrative complaint, Vonage argued that these state laws and regulations do not apply to it and that, even if they do, they are preempted by the Communications Act of 1934, as amended (Communications Act or Act). n29

n28 See Minn. Stat. §§ 237.07, 237.16, 237.49, 237.74(12); Minn. Rules §§ 7812.0200(1), 7812.0550(1).

n29 See Vonage Oct. 1 *Ex Parte* Letter, Exh. 3 at 5-12.

11. In September 2003, the Minnesota Commission issued an order asserting regulatory jurisdiction over Vonage [\*15] and ordering the company to comply with all state statutes and regulations relating to the offering of telephone service in Minnesota. n30 In so holding, the Minnesota Commission declined to decide whether Vonage's service is a telecommunications service or an information service under the Act. Instead, it found Digital Voice to be a "telephone service" as defined by Minnesota law, thus subjecting Vonage to the state requirements for offering such a service. In response, Vonage filed suit against the Minnesota Commission in the U.S. District Court for the District of Minnesota. In October 2003, the district court entered a permanent injunction in favor of Vonage. n31 The court determined that Vonage is providing an information service under the Act and that the Act preempts the Minnesota Commission's authority to subject such a service to common carrier regulation. n32 The court concluded that "VoIP services necessarily are information services, and state regulation over VoIP services is not permissible because of the recognizable



congressional intent to leave the Internet and information services largely unregulated." n33 In January 2004, the court denied a motion by the Minnesota [\*16] Commission for reconsideration, and an appeal to the U.S. Court of Appeals for the Eighth Circuit followed. The appeal remains pending. n34

n30 See, e.g., *Minnesota Vonage Order* at 8. While the order states "the Commission will require that Vonage comply with Minnesota Statutes and Rules, including certification requirements and the provisioning of 911 service," the order does not enumerate the statutory and rule provisions to which it is referring other than those specifically listed in note 27 above. See *supra* note 28. We will refer to these requirements, collectively, throughout this Order as either "telephone company regulations" or "economic regulations." It appears, however, that many Minnesota Commission rules other than those specifically mentioned in the *Minnesota Vonage Order* would only apply to Vonage as a result of its status as a certificated entity in Minnesota. See Minn. Stat. § 237.16(a). As a result, because, as described below, we specifically preempt Minnesota's certification requirements for DigitalVoice in this Order, regulations applicable to certificated entities would not be applicable to Vonage for DigitalVoice.

n31 See *Vonage Holding Corp. v. Minnesota Pub. Utils. Comm'n*, 290 F. Supp. 2d 993 (D. Minn. 2003), *appeal pending*, *Vonage Holdings Corp. v. Minnesota Pub. Utils. Comm'n*, No. 04-1434 (8th Cir.). We reject commenters' contentions that we should dismiss the Vonage Petition as moot because the Minnesota district court granted a permanent injunction. See, e.g., Minnesota Commission Comments at 4; Qwest Comments at 2; New York State AG Reply at 3. The Minnesota district court's permanent injunction is currently subject to appeal, and other courts and state commissions have open proceedings considering these issues. Accordingly, we find that this petition continues to present a "controversy" or "uncertainty" regarding the jurisdictional nature of DigitalVoice that may be addressed in a declaratory ruling. See 47 C.F.R. § 1.2. We also disagree that these issues are not ripe because Vonage can seek waivers of the Minnesota requirements. See, e.g., MTA Comments at 8. The Minnesota order directs Vonage to comply with Minnesota Statutes and Rules within 30 days without mentioning the possibility of waiver. See *Minnesota Vonage Order* at 9. The possibility of waiver, however, does not eliminate the conflict with our rules and policies. [\*17]

n32 See *Vonage Holding Corp. v. Minnesota Pub. Utils. Comm'n*, 290 F. Supp. 2d at 996-1003.

n33 *Id.* at 1002.

n34 See *Vonage Holdings Corp. v. Minnesota Pub. Utils. Comm'n*, No. 04-1434 (8th Cir.). The Commission sought a primary jurisdiction referral from the Eighth Circuit on the issues presented in this case. See Brief for the United States and the Federal Communications Commission as *Amici Curiae*, *Vonage Holdings Corp. v. Minnesota Pub. Utils. Comm'n*, No. 04-1434 (8th Cir. filed Apr. 21, 2004) (requesting a primary jurisdiction referral). The Eighth Circuit has not yet ruled on the primary jurisdiction referral. Oral argument is scheduled for November 17, 2004.

12. At the same time that it filed suit in the district court in Minnesota, Vonage filed the instant petition with the Commission. Specifically, Vonage's petition for declaratory ruling

requests that the Commission preempt the Minnesota Commission's order and find that (1) Vonage is a provider of "information services," and is not a "telecommunications carrier," as those terms are defined in the Act, n35 and (2) state regulation of this service [\*18] would unavoidably conflict "with the national policy of promoting unregulated competition in the Internet and information service market." n36 In the alternative, Vonage seeks a determination that the Minnesota Commission's order is preempted because it is impossible to separate this service, regardless of its regulatory classification, into distinct interstate and intrastate communications. n37 Vonage also seeks a ruling that certain specific E911 requirements imposed by the Minnesota Commission are in conflict with federal policies. n38 On August 13, 2004, Vonage submitted additional information to the Commission in this matter, requesting that we act expeditiously on its pending petition insofar as it concerned the jurisdictional nature of the service, explaining that such a determination could be rendered independent of the statutory classification of the service. n39

n35 See 47 U.S.C. § 153(20) (defining "information service"); 47 U.S.C. § 153(43) (defining "telecommunications"); 47 U.S.C. § 153(44) (defining "telecommunications carrier"); 47 U.S.C. § 153(46) (defining "telecommunications service"). [\*19]

n36 See Vonage Petition at 1.

n37 *Id.*

n38 *Id.*; see also 8x8 Comments at 15-17.

n39 See Letter from William B. Wilhelm, Jr., Counsel for Vonage, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 03-211, 04-36, at 1-2 (filed Aug. 13, 2004) (Vonage Aug. 13 *Ex Parte* Letter).

13. Since Vonage filed its petition, a number of other states have opened proceedings to examine the jurisdictional nature of VoIP services offered in their states. n40 For example, in May 2004, the New York State Public Service Commission (New York Commission) adopted an order finding that Vonage, in offering and providing DigitalVoice in New York, is a "telephone corporation" as defined by New York state law, and is therefore subject to certain requirements. n41 The New York Commission asserted jurisdiction over Vonage and ordered it to obtain state certification and to file a tariff, but permitted Vonage to seek waivers of New York regulations that it deemed inappropriate or with which it was not readily able to comply. n42 Vonage sought, and in July the U.S. District Court for the Southern District of New York granted, a preliminary injunction of the *New York Vonage Order*. [\*20] n43 The court held that "Vonage has shown that it is likely to succeed on the merits of its claim that the [*New York Vonage Order*] is preempted by federal law"; that "Vonage has demonstrated that the [*New York Vonage Order*] will interfere with interstate commerce"; and that this Commission's guidance, via orders in the *IP-Enabled Services Proceeding* or the instant proceeding, "may aid in final resolution of the matter." n44 The court has scheduled a status conference on December 13, 2004 to consider whether there is a need for further proceedings in this matter, including a determination on Vonage's request for permanent injunctive relief. n45

n40 See, e.g., *Order Instituting Investigation on the Commission's Own Motion to Determine the Extent to Which the Public Utility Telephone Service Known as Voice over Internet Protocol Should Be Exempted from Regulatory Requirements*, Investigation 04-02-007, Order Instituting Investigation (issued Feb. 11, 2004) (initiating a proceeding by the California Public Utilities Commission to investigate VoIP services).

n41 See *Complaint of Frontier Telephone of Rochester, Inc. against Vonage Holdings Corporation Concerning Provision of Local Exchange and Interexchange Telephone Service in New York State in Violation of the Public Service Law*, Case 03-C-1285, Order Establishing Balanced Regulatory Framework for Vonage Holdings Corporation at 10 (issued May 21, 2004) (*New York Vonage Order*). [\*21]

n42 See *id.* at 17.

n43 See *Vonage Holdings Corp. v. New York State Public Service Comm'n*, 04 Civ. 4306 (DFE) (S.D.N.Y. July 16, 2004) (Order of Magistrate Judge Eaton) (*New York Preliminary Injunction*) (entering a preliminary injunction against the New York Commission's order).

n44 *Id.* at 2-3.

n45 See *id.* at 3.

### III. DISCUSSION

14. We grant Vonage's petition in part n46 and preempt the *Minnesota Vonage Order*. n47 We find that the characteristics of DigitalVoice preclude any practical identification of, and separation into, interstate and intrastate communications for purposes of effectuating a dual federal/state regulatory scheme, and that permitting Minnesota's regulations would thwart federal law and policy. We reach this decision irrespective of the definitional classification of DigitalVoice under the Act, i.e., telecommunications or information service, a determination we do not reach in this Order. Although Congress did not explicitly prescribe the regulatory framework for Internet-based communications like DigitalVoice when it amended the Act in 1996, n48 its statements regarding the Internet and advanced telecommunications capabilities [\*22] in sections 230 and 706 indicate that our actions here are consistent with its intent concerning these emerging technologies. In addition, we address the fact that multiple state regulatory regimes would likely violate the Commerce Clause because of the unavoidable effect that regulation on an intrastate component would have on interstate use of this service or use of the service within other states. Finally, although we preempt the *Minnesota Vonage Order*, including its 911 requirements imposed as a condition to entry, we fully expect Vonage to continue its efforts to develop a 911 capability as we work toward resolving this important public safety issue in the *IP-Enabled Services Proceeding* as discussed below. n49

n46 We do not determine the statutory classification of DigitalVoice under the Communications Act, and thus do not decide here the appropriate federal regulations, if any, that will govern this service in the future. These issues are currently the subject of our *IP-Enabled Services Proceeding* where the Commission is comprehensively examining numerous types of IP-enabled services, including services like DigitalVoice. See generally *IP-Enabled*

*Services Proceeding*, 19 FCC Rcd 4863. That proceeding will resolve important regulatory matters with respect to IP-enabled services generally, including services such as DigitalVoice, concerning issues such as the Universal Service Fund, intercarrier compensation, 911/E911, consumer protection, disability access requirements, and the extent to which states have a role in such matters. In addition, the Commission recently initiated a rulemaking proceeding to address law enforcement's needs relative to the Communications Assistance for Law Enforcement Act (CALEA), including the scope of services that are covered, who bears responsibility for compliance, the wiretap capabilities required by law enforcement, and acceptable compliance standards. Our decision in this Order does not prejudice the outcome of our proceeding on CALEA. *See Communications Assistance for Law Enforcement Act and Broadband Access and Services*, ET Docket No. 04-295; RM-10865, Notice of Proposed Rulemaking and Declaratory Ruling, 19 FCC Rcd 15676 (2004); *see also* DOJ/FBI Comments at 10-13, DOJ/FBI Reply at 7-10. These issues are complex and critically important matters. While these matters are being comprehensively addressed, however, it is essential that we take action to bring some greater measure of certainty to the industry to permit services like DigitalVoice to evolve. By ruling on the narrow jurisdictional question here, we enable this Commission and the states to focus resources in working together along with the industry to address the numerous other unresolved issues related to this and other IP-enabled and advanced communications services that are of paramount importance to the future of the communications industry. *See, e.g.,* PacWest/RCN Reply at 5; USA DataNet Comments at 2-3 (urging the Commission to act on the Vonage Petition). *But see, e.g.,* DOJ/FBI Comments at 9; Minnesota Commission Comments at 4; Montana Independent Telecommunications Systems Comments at 5; Qwest Comments at 3-4; USTA Comments at 3-4; DOJ/FBI Reply at 5-7; Minnesota Commission Reply at 3; Verizon Reply at 6 (urging the Commission not to act on the Vonage Petition, but instead to decide these issues in a comprehensive rulemaking proceeding). [\*23]

n47 As we noted above, this Order does not address Minnesota's general laws governing entities conducting business within the state, such as laws concerning taxation; fraud; general commercial dealings; marketing, advertising, billing and other business practices. *See supra* para. 1.

n48 Telecommunications Act of 1996, Pub. Law No. 104-104, 110 Stat. 56 (1996) (1996 Act).

n49 Access to emergency services for VoIP services, including 911, is a critical public safety issue. This issue, and the extent to which states may have a role in such matters, will be addressed in the *IP-Enabled Services Proceeding*. We address this issue in a limited manner in this Order only because of the manner in which Minnesota ties its 911 requirements to entry authority. *See infra* paras. 42-44.

#### **A. Preemption of the Minnesota Vonage Order**

15. We begin our analysis by briefly examining the distribution of authority over communications services between federal and state agencies under the Act. We then discuss judicial precedent that recognizes circumstances where state jurisdiction must yield to federal jurisdiction through the Commission's authority to preempt state regulations [\*24] that thwart the lawful exercise of federal authority over interstate communications. Next, we explain our current federal rules and policies for services like DigitalVoice followed by our demonstration of the impossibility of separating DigitalVoice into interstate and intrastate components for purposes of complying with the Minnesota regulations without negating federal policies and directly conflicting with our own regulations. We conclude that

preempting the *Minnesota Vonage Order* is compelled to avoid thwarting valid federal objectives for innovative new competitive services like DigitalVoice, finding consistency between our action here and Congress's articulated policies in sections 230 and 706 of the Act.

### 1. Commission Jurisdiction over DigitalVoice

16. In the absence of a specific statutory provision regarding jurisdiction over services like DigitalVoice, we begin with section 2 of the Act. n50 In 1934, Congress set up a dual regulatory regime for communications services. n51 In section 2(a) of the Act, Congress has given the Commission exclusive jurisdiction over "all interstate and foreign communication" and "all persons engaged . . . in such communication." n52 Section [\*25] 2(b) of the Act reserves to the states jurisdiction "with respect to intrastate communication service . . . of any carrier." n53

n50 See *Bell Atl. Tel. Cos. v. FCC*, 131 F.3d 1044 (D.C. Cir. 1997).

n51 See generally 47 U.S.C. § 152.

n52 47 U.S.C. § 152(a). Congress defined "interstate communication" as "communication or transmission . . . from any State, Territory, or possession of the United States. . . to any other State, Territory, or possession of the United States . . . but shall not . . . include wire or radio communication between points in the same State . . . through any place outside thereof, if such communication is regulated by a State commission." 47 U.S.C. § 153(22).

n53 47 U.S.C. § 152(b). "Intrastate communications" is not separately defined in the Act except to the extent it is described in the definition of "interstate communication" as a "wire or radio communication between *points* in the same State." 47 U.S.C. § 153(22) (emphasis added). We note that section 2(b) reserves to the states only matters connected with "carriers," which means "common carriers" or "telecommunications carriers" under sections 3 (10) and 3(44) of the Act. 47 U.S.C. § 153(10), (44). Here, we do not determine whether Vonage is a "carrier"; however, our analysis with respect to section 2(b) assumes that it is. This assumption for purposes of this Order, however, in no way prejudices how the Commission may ultimately classify DigitalVoice. [\*26]

17. In applying section 2 to specific services and facilities, the Commission has traditionally applied its so-called "end-to-end analysis" based on the physical end points of the communication. n54 Under this analysis, the Commission considers the "continuous path of communications," beginning with the end point at the inception of a communication to the end point at its completion, and has rejected attempts to divide communications at any intermediate points. n55 Using an end-to-end approach, when the end points of a carrier's service are within the boundaries of a single state the service is deemed a purely intrastate service, subject to state jurisdiction for determining appropriate regulations to govern such service. n56 When a service's end points are in different states or between a state and a point outside the United States, the service is deemed a purely interstate service subject to the Commission's exclusive jurisdiction. n57 Services that are capable of communications both between intrastate end points and between interstate end points are deemed to be "mixed-use" or "jurisdictionally mixed" services. n58 Mixed-use services are generally subject to dual federal/state [\*27] jurisdiction, except where it is impossible or impractical to separate the service's intrastate from interstate components and the state regulation of the intrastate component interferes with valid federal rules or policies. n59 In such

circumstances, the Commission may exercise its authority to preempt inconsistent state regulations that thwart federal objectives, treating jurisdictionally mixed services as interstate with respect to the preempted regulations. n60

n54 See, e.g., *Bell Atl. Tel. Cos. v. FCC*, 206 F.3d 1, 3 (D.C. Cir. 2000); see *infra* para. 24 (addressing difficulties with an end-to-end approach for services involving the Internet).

n55 See, e.g., *Pulver*, 19 FCC Rcd at 3320-21, para. 21.

n56 See 47 U.S.C. § 152(b)(1).

n57 See 47 U.S.C. § 153(22).

n58 See, e.g., *MTS and WATS Market Structure Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board*, CC Docket Nos. 78-72, 80-286, Memorandum Opinion and Order on Reconsideration and Order Inviting Comments, 1 FCC Rcd 1287 (1987); *Petition for Emergency Relief and Declaratory Ruling Filed by the BellSouth Corporation*, Memorandum Opinion and Order, 7 FCC Rcd 1619, 1620, para. 7 (1992) (*BellSouth MemoryCall*); *Southwestern Bell Tel. Co. v. FCC*, 153 F.3d 523, 543 (8th Cir. 1998). [\*28]

n59 See *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 368 (1986) (finding a basis for Commission preemption where compliance with both federal and state law is in effect physically impossible) (citing *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963)); *BellSouth MemoryCall*, 7 FCC Rcd at 1622-23, paras. 18-19.

n60 Indeed, the Eighth Circuit has recently noted the Commission's authority to preempt in the area of jurisdictionally mixed special access services. See *Qwest Corp. v. Minnesota Pub. Utils. Comm'n*, 380 F.3d 367, 374 (8th Cir. 2004) (finding that, with respect to special access services, the Commission "certainly has the wherewithal to preempt state regulation in this area if it so desires") (emphasis added).

18. Thus, our threshold determination must be whether DigitalVoice is purely intrastate (subject only to state jurisdiction) or jurisdictionally mixed (subject also to federal jurisdiction). The nature of DigitalVoice precludes any suggestion that the service could be characterized as a purely intrastate service. n61 [\*29] As Vonage has indicated, it has over 275,000 subscribers located throughout the United States, each with the ability to communicate with anyone in the world from anywhere in the world. n62 While DigitalVoice clearly enables intrastate communications, it also enables interstate communications. It is therefore a jurisdictionally mixed service, n63 and this Commission has exclusive jurisdiction under the Act to determine the policies and rules, if any, that govern the interstate aspect of DigitalVoice service. n64

n61 We need not address in this Order the case of purely intrastate service, which is not the service we have before us in this petition.

n62 See Vonage Oct. 1 *Ex Parte* Letter at 2 (explaining that its subscribers have billing addresses in each of the 50 states, the District of Columbia and throughout Canada, that its subscribers regularly use the service from countries outside North America, including "Argentina, Australia . . . and the United Kingdom," and that customers have used the service "from virtually every inhabitable continent in the world").

n63 We analyze DigitalVoice for purposes of preemption as a jurisdictionally mixed service due to its recognized capability to enable communications to occur not only between different states but within a particular state. This notwithstanding, it is possible that the Commission may find, in the context of the *IP-Enabled Services Proceeding*, that this type of service simply has no intrastate component. [\*30]

n64 See *Louisiana Pub. Serv. Comm'n*, 476 U.S. at 360 (explaining how the Act would seem to divide the world of domestic telephone service into two hemispheres -- one comprised of interstate service, over which the Commission has "plenary authority"); see also *Ivy Broad. Co. v. American Tel. & Tel. Co.*, 391 F.2d 486, 490 (2d Cir. 1968) ("The Supreme Court has held that the establishment of this broad scheme for the regulation of interstate service by communications carriers indicates an intent on the part of Congress to occupy the field to the exclusion of state law.").

## 2. Commission Authority To Preempt State Regulations

19. Although the Communications Act establishes dual federal-state authority to regulate certain communications services, courts routinely recognize that there may be circumstances where state regulation would necessarily conflict with the Commission's valid exercise of authority. n65 Where separating a service into interstate and intrastate communications is impossible or impractical, the Supreme Court has recognized the Commission's authority to preempt state regulation that would thwart or impede [\*31] the lawful exercise of federal authority over the interstate component of the communications. n66 The D.C. Circuit, for example, applied this impossibility exception in affirming a Commission order preempting state regulation of the rate a local exchange carrier (LEC) charged an interexchange carrier for a disconnection service. n67 The court explained that Commission preemption of state regulation is permissible when the matter to be regulated has both interstate and intrastate aspects; preemption is necessary to protect a valid federal regulatory objective; and "state regulation would 'negate[] the exercise by the FCC of its own lawful authority' because regulation of the interstate aspects of the matter cannot be 'unbundled' from regulation of the intrastate aspects." n68 Such is the case with DigitalVoice service as discussed in detail below.

n65 See *Louisiana Pub. Serv. Comm'n*, 476 U.S. at 375 n.4 (citing *North Carolina Utils. Comm'n v. FCC*, 537 F.2d 787 (4th Cir. 1976), cert. denied, 429 U.S. 1027 (1976); *North Carolina Utils. Comm'n v. FCC*, 552 F.2d 1036 (4th Cir. 1977) cert. denied, 434 U.S. 874 (1977) (upholding Commission preemption of state regulation because it was not possible to separate the interstate and intrastate components of the asserted Commission regulation)); see also *New York State Comm'n on Cable Television v. FCC*, 749 F.2d 804 (D.C. Cir. 1984) (affirming Commission order preempting state and local entry regulation of satellite master antenna television); *Promotion of Competitive Networks in Local Telecommunications Markets*; *Wireless Communications Association International, Inc. Petition for Rulemaking to Amend Section 1.4000 of the Commission's Rules to Preempt Restrictions on Subscriber*

*Premises Reception or Transmission Antennas Designed to Provide Fixed Wireless Services; Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Review of Sections 68.104, and 68.213 of the Commission's Rules Concerning Connection of Simple Inside Wiring to the Telephone Network*, WT Docket No. 99-217; CC Docket Nos. 96-98, 88-57, First Report and Order and Further Notice of Proposed Rulemaking; Fifth Report and Order and Memorandum Opinion and Order; Fourth Report and Order and Memorandum Opinion and Order, 15 FCC Rcd 22983, 23031-32, para. 107 (2000) (preempting state regulation of fixed wireless antennas as an impediment to the full achievement of important federal objectives). [**\*32**]

n66 See *Louisiana Pub. Serv. Comm'n*, 476 U.S. at 368-69. The Court also said that the "critical question in any preemption analysis is always whether Congress intended that federal regulation supersede state law." *Id.* at 369. As summarized by the Supreme Court, federal law and policy preempt state action in several circumstances: (1) where compliance with both federal and state law is in effect physically impossible (citing *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132); (2) when there is outright or actual conflict between federal and state law (citing *Free v. Bland*, 369 U.S. 663 (1962)); (3) where the state law stands as an obstacle to the accomplishment and execution of the full objectives of Congress (citing *Hines v. Davidowitz*, 312 U.S. 52 (1941)); (4) when Congress expresses a clear intent to preempt state law; (5) where there is implicit in federal law a barrier to state regulation; and (6) where Congress has legislated comprehensively, thus occupying an entire field of regulation. Additionally, the Supreme Court has held that preemption may result not only from action taken by Congress but also from a federal agency action that is within the scope of the agency's congressionally delegated authority. *Louisiana Pub. Serv. Comm'n*, 476 U.S. at 369 (citing *Fidelity Federal Savings & Loan Ass'n v. De la Cuesta*, 458 U.S. 141 (1982); *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691 (1984)). [**\*33**]

n67 See *Pub. Serv. Comm'n of Maryland v. FCC*, 909 F.2d 1510 (D.C. Cir. 1990).

n68 *Id.* at 1515 (citing *National Ass'n of Regulatory Util. Comm'rs v. FCC*, 880 F.2d 422, 429-31 (D.C. Cir. 1989); *Illinois Bell Tel. Co. v. FCC*, 883 F.2d 104, 113 (D.C. Cir. 1989); *Public Util. Comm'n of Texas v. FCC*, 886 F.2d 1325, 1329, 1331-33 (D.C. Cir. 1989)).

### **3. Conflict With Commission Rules and Policies**

20. Regardless of the definitional classification of DigitalVoice under the Communications Act, the *Minnesota Vonage Order* directly conflicts with our pro-competitive deregulatory rules and policies governing entry regulations, tariffing, and other requirements arising from these regulations for services such as DigitalVoice. n69 Were DigitalVoice to be classified a telecommunications service, Vonage would be considered a nondominant, competitive telecommunications provider for which the Commission has eliminated entry and tariff filing requirements with respect to services like DigitalVoice. n70 In particular, in completely eliminating [**\*34**] interstate market entry requirements, the Commission reasoned that retaining entry requirements could stifle new and innovative services whereas blanket entry authority, i.e., unconditional entry, would promote competition. n71 State entry and certification requirements, such as the Minnesota Commission's, require the filing of an application which must contain detailed information regarding all aspects of the qualifications of the would-be service provider, including public disclosure of detailed financial information, operational and business plans, and proposed service offerings. n72 The application process can take months and result in denial of a certificate, thus preventing entry altogether. n73 Similarly, when the Commission ordered the mandatory detariffing of most interstate,



domestic interexchange services (including services like DigitalVoice), the Commission found that prohibiting such tariffs would promote competition and the public interest, and that tariffs for these services *may actually harm consumers* by impeding the development of vigorous competition. n74 Tariffs and "price lists," such as those required by Minnesota's statutes and rules, are lengthy documents [\*35] subject to specific filing and notice requirements that must contain every rate, term, and condition of service offered by the provider, including terms and conditions to which the provider may be subject in its certificate of authority. n75 The Minnesota Commission may also require the filing of cost-justification information or order a change in a rate, term or condition set forth in the tariff. n76 The administrative process involved in entry certification and tariff filing requirements, alone, introduces substantial delay in time-to-market and ability to respond to changing consumer demands, not to mention the impact these processes have on how an entity subject to such requirements provides its service.

n69 While we do not rely on it as a basis for our action in this Order, we also note that section 253 of the Act provides the Commission additional preemption authority over state regulations that "prohibit or have the effect of prohibiting the ability of an entity to provide any interstate or intrastate telecommunications service." 47 U.S.C. § 253. See Vonage Petition at 28 n.55 (indicating it does not submit its petition under section 253). Were DigitalVoice to be classified as a telecommunications service, however, it is possible that we could find state economic regulation such as that imposed by Minnesota to be a prohibition on the provision of an interstate and intrastate telecommunications services under section 253. See Vonage Petition at 11, 28 (describing that it is technically and practically impossible to comply with Minnesota's "telephone company" rules). [\*36]

n70 See, e.g., *Implementation of Section 402(b)(2)(A) of the Telecommunications Act of 1996; Petition for Forbearance of the Independent Telephone & Telecommunications Alliance*, CC Docket No. 97-11; AAD File No. 98-43, Report and Order and Second Memorandum Opinion and Order, 14 FCC Rcd 11364, 11372-75, paras. 12-16 (1999) (*Section 214 Order*) (granting blanket section 214 authority for new lines of all domestic carriers including dominant carriers like the Bell operating companies (BOCs)); *Policy and Rules Concerning the Interstate, Interexchange Marketplace; Implementation of Section 245(g) of the Communications Act of 1934*, CC Docket No. 96-61, Second Report and Order, 11 FCC Rcd 20730 (1996) (*Interexchange Detariffing Order*) (adopting mandatory detariffing of most domestic interstate, interexchange services); Order on Reconsideration, 12 FCC 15014 (1997); Second Order on Reconsideration and Erratum, 14 FCC Rcd 6004 (1999), *aff'd*, *MCI WorldCom, Inc. v. FCC*, 209 F.3d 760 (D.C. Cir. 2000); *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, First Report and Order, 85 FCC 2d 1 (1980) (subsequent history omitted) (*Competitive Carrier Proceeding*) (adopting regulatory framework based on dominant or nondominant status of carriers). [\*37]

n71 See *Section 214 Order*, 14 FCC Rcd at 11373, para. 14 ("By its very terms, blanket authority removes regulatory hurdles to market entry, thereby promoting competition."); *id.* at 11373, para. 13 ("Rather than maintaining [entry requirements] that may stifle new and innovative services[,] . . . we believe it is more consistent with the goals of the 1996 Act to remove this hurdle.").

n72 See Minn. Rule § 7812.0200.

n73 See Minn. Stat. § 237.16(c)

n74 See *Interexchange Detariffing Order*, 11 FCC Rcd at 20760, para. 52 (emphasis added) ("We find that not permitting nondominant interexchange carriers to file tariffs with respect to interstate, domestic, interexchange services will enhance competition among providers of such services, promote competitive market conditions, and achieve other objectives that are in the public interest, including eliminating the possible invocation of the filed rate doctrine by nondominant interexchange carriers, and establishing market conditions that more closely resemble an unregulated environment."); *id.* at 20750, para. 37 ("We also adopt the tentative conclusion that in the interstate, domestic, interexchange market, requiring nondominant interexchange carriers to file tariffs for interstate, domestic, interexchange services may harm consumers by impeding the development of vigorous competition, which could lead to higher rates."). We note that certain exceptions to the Commission's mandatory detariffing rules exist; however, these exceptions would not apply to services like DigitalVoice were it to be classified a telecommunications service. [\*38]

n75 See Minn. Stat. § 237.07; see also, e.g., Minn. Rules §§ 7812.0300(6), 7812.0350(6), 7812.2210(2).

n76 See, e.g., Minn. Rule §§ 7812.2210(4),(8).

21. On the other hand, if DigitalVoice were to be classified as an information service, it would be subject to the Commission's long-standing national policy of nonregulation of information services, n77 particularly regarding economic regulation such as the type imposed on Vonage in the *Minnesota Vonage Order*. n78 In a series of proceedings beginning in the 1960's, the Commission issued orders finding that economic regulation of information services would disserve the public interest because these services lacked the monopoly characteristics that led to such regulation of common carrier services historically. The Commission found the market for these services to be competitive and best able to "burgeon and flourish" in an environment of "free give-and-take of the market place without the need for and possible burden of rules, regulations and licensing requirements." n79

n77 See *Regulatory and Policy Problems Presented by the Interdependence of Computer and Communication Services and Facilities*, Docket No. 16979, Notice of Inquiry, 7 FCC 2d 11 (1966) (*Computer I NOI*); *Regulatory and Policy Problems Presented by the Interdependence of Computer and Communication Services and Facilities*, Docket No. 16979, Final Decision and Order, 28 FCC 2d 267 (1971) (*Computer I Final Decision*); *Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, Docket No. 20828, Tentative Decision and Further Notice of Inquiry and Rulemaking, 72 FCC 2d 358 (1979) (*Computer II Tentative Decision*); *Computer II Final Decision*, 77 FCC 2d 384 (1980); *Amendment of Section 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry)*, CC Docket No. 85-229, Report and Order, 104 FCC 2d 958 (1986) (*Computer III*) (subsequent history omitted) (collectively the *Computer Inquiry Proceeding*). In its *Second Computer Inquiry* proceeding, the Commission "adopted a regulatory scheme that distinguished between the common carriage offering of basic transmission services and the offering of enhanced services." *Computer II Final Decision*, 77 FCC 2d at 387; see also *Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review -- Review of Computer III and ONA Safeguards*

and Requirements, 13 FCC Rcd 6040, 6064, para. 38 (1998). The former services are regulated under Title II and the latter services are not. See *Computer II Final Decision*, 77 FCC 2d at 428-30, 432-43, paras. 113-18, 124-49 (indicating it would not serve the public interest to subject enhanced service providers to traditional common carrier regulation under Title II because, among other things, the enhanced services market was "truly competitive"). The 1996 Act uses different terminology (*i.e.*, "telecommunications services" and "information services") than used by the Commission in its *Computer Inquiry* proceeding, but the Commission has determined that "enhanced services" and "information services" should be interpreted to extend to the same functions, although the definition in the 1996 Act is even broader. See *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as Amended*, CC Docket No. 96-149, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 21905, 21955-56, para. 102 (1996) (*Non-Accounting Safeguards Order*) (subsequent history omitted) (explaining that all enhanced services are information services, but information services are broader and may not be enhanced services). [\*39]

n78 See, *e.g.*, *Pulver*, 19 FCC Rcd at 3317-20, paras. 17-20 (explaining the Commission's policy of nonregulation for information services and how the 1996 Act reinforces this policy). This policy of nonregulation refers primarily to economic, public-utility type regulation, as opposed to generally applicable commercial consumer protection statutes, or similar generally applicable state laws. Indeed, the preeminence of federal authority over information services has prevailed unless a carrier-provided information service could be characterized as "purely intrastate," see *California v. FCC*, 905 F.2d 1217, 1239-42 (9th Cir. 1990), or it is possible to separate out the interstate and intrastate components and state regulation of the intrastate component would not negate valid Commission regulatory goals. See *California v. FCC*, 39 F.3d 919 (9th Cir. 1994) (*California III*), cert. denied, 514 U.S. 1050 (1995) (affirming Commission preemption of certain state requirements for separation of facilities and personnel in the BOC provision of jurisdictionally mixed enhanced services as state regulations would negate national policy). [\*40]

n79 See *Computer II Final Decision*, 77 FCC 2d at 425-33, paras. 109-27 (citing *Computer I, Tentative Decision*, 27 FCC 2d at 297-298).

22. Thus, under existing Commission precedent, regardless of its definitional classification, and unless it is possible to separate a Minnesota-only component of DigitalVoice from the interstate component, Minnesota's order produces a direct conflict with our federal law and policies, and impermissibly encroaches on our exclusive jurisdiction over interstate services such as DigitalVoice. This notwithstanding, some commenters argue that the traditional dual regulatory scheme must nevertheless apply to DigitalVoice *because it is functionally similar* to traditional local exchange and long distance voice service. n80 Were it appropriate to base our decision today on the applicability of Minnesota's "telephone company" regulations to DigitalVoice solely on the functional similarities between DigitalVoice and other existing voice services (as the Minnesota Commission appears to have done), n81 we would find DigitalVoice *far more similar* to CMRS, which provides mobility, is often offered [\*41] as an all-distance service, and needs uniform national treatment on many issues. n82 Indeed, in view of these differences, CMRS, including IP-enabled CMRS, is expressly exempt from the type of state economic regulation Minnesota seeks to impose on DigitalVoice. n83 Commenters that argue that the Act requires the Commission to recognize state jurisdiction over DigitalVoice to the extent it enables "intrastate" communications to occur completely ignore the considerations that dictate preemption here. n84 Indeed, the fact that a particular service enables communication within a state does not necessarily subject it to state economic regulation. We have acknowledged similar "intrastate" communications capabilities

in other services involving the Internet, where for regulatory purposes, treatment as an interstate service prevailed despite this "intrastate" capability. n85

n80 See, e.g., ITTA Comments at 10-12; Minnesota Commission Comments at 3; MTA Comments at 13-14; RIITA Comments at 2; Surewest Comments at 4-5; GVNW Reply at 2-3; Minnesota Commission Reply at 4-5, 7; NASUCA Reply at 9, 11-12; Sprint Reply at 2-3. But see Verizon Reply at 2-6.

n81 See *Minnesota Vonage Order* at 8 (finding Vonage's service to be "functionally no different than any other telephone service"). [\*42]

n82 Indeed, other commenters note how DigitalVoice is like CMRS. See, e.g., California Commission Comments at 20-22; HTBC Comments at 9.

n83 See 47 U.S.C. § 332(c)(3)(A). Pursuant to section 332 of the Act, state and local governments are specifically preempted from regulating the "entry of or the rates charged by any commercial mobile service or any private mobile service." *Id.* (emphasis added).

n84 See, e.g., New York Commission Comments at 3; California Commission Comments at 4, 19; NASUCA Reply at 15; OTA/WIT Reply Comment at 8; Sprint Reply at 6-7.

n85 For example, the Commission concluded that some traffic over GTE's asymmetrical digital subscriber line (ADSL) service would, in fact, be terminated in the state where it originated, or even locally, but the service is "an interstate service and is properly tariffed at the federal level." See *GTE ADSL Order*, 13 FCC Rcd at 22466, 22478-79, paras. 1, 22. The Commission left open the possibility that a purely intrastate xDSL service may be offered which would be tariffed at the state level. See *id.* at 22481, para. 27. The Commission similarly determined that cable modem service is an interstate service because the points among which cable modem communications travel are often in different states and countries. See *Cable Modem Declaratory Ruling*, 17 FCC Rcd at 4832, para. 59. The jurisdictionally interstate finding of cable modem service was not an issue on appeal. See *Brand X Internet Services v. FCC*, 345 F.3d 1120. Finally, in *Pulver*, the Commission held that Pulver's "intrastate capabilities" should not remove the service from our jurisdiction. See *Pulver*, 19 FCC Rcd at 3320-22, paras. 20-22. [\*43]

#### **4. Preemption Based on "Impossibility"**

23. In this section, we examine whether there is any plausible approach to separating *DigitalVoice* into interstate and intrastate components for purposes of enabling dual federal and state regulations to coexist without "negating" federal policy and rules. n86 We find none. Without a practical means to separate the service, the *Minnesota Vonage Order* unavoidably reaches the interstate components of the *DigitalVoice* service that are subject to exclusive federal jurisdiction. Vonage has no means of directly or indirectly identifying the geographic location of a *DigitalVoice* subscriber. Even, however, if this information were reliably obtainable, Vonage's service is far too multifaceted for simple identification of the user's location to indicate jurisdiction. Moreover, the significant costs and operational complexities associated with modifying or procuring systems to track, record and process geographic location information as a necessary aspect of the service would substantially

reduce the benefits of using the Internet to provide the service, and potentially inhibit its deployment and continued availability to consumers. n87

n86 See *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. at 368 (holding that the Supremacy Clause of Article VI of the Constitution provides Congress with the power to preempt state law and explaining the numerous bases for preemption); see also *Pub. Serv. Comm'n of Maryland v. FCC*, 909 F.2d at 1515 (citing *Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC*, 880 F.2d at 429-31); *Nat'l Ass'n of Regulatory Util. Comm'rs*, 880 F.2d at 425 ("We conclude that the Commission may only preempt state regulation over intrastate wire communication to the degree necessary to keep such regulation from negating the Commission's exercise of its lawful authority over interstate communication service."). [\*44]

n87 See Letter from William B. Wilhelm, Jr. and Ronald W. Del Sesto, Jr., Counsel for Vonage, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 03-211, at 5 (filed Oct. 19, 2004) (Vonage Oct. 19 *Ex Parte* Letter)

24. DigitalVoice harnesses the power of the Internet to enable its users to establish a virtual presence in multiple locations simultaneously, to be reachable anywhere they may find a broadband connection, and to manage their communications needs from any broadband connection. The Internet's inherently global and open architecture obviates the need for any correlation between Vonage's DigitalVoice service and its end users' geographic locations. As we noted above, however, the Commission has historically applied the geographic "end-to-end" analysis to distinguish interstate from intrastate communications. n88 As networks have changed and the services provided over them have evolved, the Commission has increasingly acknowledged the difficulty of using an end-to-end analysis when the services at issue involve the Internet. n89 DigitalVoice shares many of the same characteristics as these other services involving the Internet, thus making jurisdictional determinations [\*45] about particular DigitalVoice communications based on an end-point approach difficult, if not impossible. n90

n88 See *supra* para. 17.

n89 For example, in attempting to apply an end-to-end analysis to an incumbent LEC's digital subscriber line (DSL) telecommunications service to determine whether federal or state tariffing requirements should attach, the Commission noted that "an Internet communication does not necessarily have a point of 'termination' in the traditional sense." GTE ADSL Order, 13 FCC Rcd at 22478-79, para. 22. In a later proceeding involving the provision of Telecommunications Relay Service over the Internet, the Commission similarly noted the difficulty in pinpointing the origination of an IP-Relay call arising over the Internet because Internet addresses do not have geographic correlates equivalent to the PSTN's automatic number identifiers, which are tied to geographic locations, and thus, there is no automatic way to determine whether any call is intrastate or interstate. See *Provision of Improved Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, CC Docket No. 98-67, Declaratory Ruling and Second Further Notice of Proposed Rulemaking, 17 FCC 7779, 7784, para. 15 (2002) (*IP-Relay Second FNPRM*). Significantly, as recently as June, the Commission issued yet another Further Notice of Proposed Rulemaking in this proceeding, recognizing the continued technological inability to identify the location of an IP-Relay user. See *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech*

*Disabilities*, CC Docket Nos. 90-571, 98-67; CG Docket No. 03-123, Report and Order; Order on Reconsideration; Further Notice of Proposed Rulemaking, 19 FCC Rcd 12475, 12561, para. 221 (2004) (2004 IP-Relay FNPRM). In *Pulver*, the Commission concluded that the concept of "end points" and an end-to-end analysis were not relevant to *Pulver's* Internet-based VoIP information service. See *Pulver*, 19 FCC Rcd at 3316-23, paras. 15-25. [\*46]

n90 See Vonage Petition at 5, 28.

25. In fact, the geographic location of the end user at any particular time is only one clue to a jurisdictional finding under the end-to-end analysis. The geographic location of the "termination" of the communication is the other clue; yet this is similarly difficult or impossible to pinpoint. This "impossibility" results from the inherent capability of IP-based services to enable subscribers to utilize multiple service features that access different websites or IP addresses during the same communication session and to perform different types of communications simultaneously, none of which the provider has a means to separately track or record. n91 For example, a DigitalVoice user checking voicemail or reconfiguring service options would be communicating with a Vonage server. A user forwarding a voicemail via e-mail to a colleague using an Internet-based e-mail service would be "communicating" with a different Internet server or user. An incoming call to a user invoking forwarding features could "terminate" anywhere the DigitalVoice user has programmed. A communication from a DigitalVoice user to a similar IP-enabled provider's user would [\*47] "terminate" to a geographic location unknown either to Vonage or to the other provider. n92 These functionalities in all their combinations form an integrated communications service designed to overcome geography, not track it. Indeed, it is the total lack of dependence on *any* geographically defined location that most distinguishes DigitalVoice from other services whose federal or state jurisdiction is determined based on the geographic end points of the communications. n93 Consequently, Vonage has no service-driven reason to know users' locations, n94 and Vonage asserts it presently has no way to know. n95 Furthermore, to require Vonage to attempt to incorporate geographic "end-point" identification capabilities into its service solely to facilitate the use of an end-to-end approach would serve no legitimate policy purpose. n96 Rather than encouraging and promoting the development of innovative, competitive advanced service offerings, n97 we would be taking the opposite course, molding this new service into the same old familiar shape.

n91 See, e.g., Vonage Oct. 19 *Ex Parte* Letter at 4-5 (explaining that in addition to having no way to determine a geographic origination point, determining a geographic destination is not possible either); see also Letter from Glenn T. Reynolds, BellSouth Corp., to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 04-36; 03-211, Attach. at 6-12 (filed Oct. 26, 2004) (BellSouth Oct. 26 *Ex Parte* Letter) (explaining the multitude of simultaneous capabilities during a single communication that makes a point of destination unknown); Letter from Howard Symons, Counsel for NTCA, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 03-211, 04-36 Attach. at 2-3 (filed Oct. 28, 2004) (NCTA Oct. 28 *Ex Parte* Letter) (describing the core integrated features that "cable VoIP" provides to subscribers); Letter from Adam D. Krinsky, Counsel for CTIA, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 04-36; 03-211, (filed Oct. 25, 2004) (CTIA Oct. 25 *Ex Parte* Letter) (explaining that IP-enabled services do not have definable termination points). [\*48]

n92 See Vonage Oct. 19 *Ex Parte* Letter at 4-5.

n93 We note that these integrated capabilities and features are not unique to DigitalVoice, but are inherent features of most, if not all, IP-based services having basic characteristics found in DigitalVoice, including those offered or planned by facilities-based providers. See *infra* note 113 for a brief summary of these basic characteristics; see also, e.g., Letter from Kathleen Grillo, Verizon, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 03-211 at 1-3 (filed Nov. 1, 2004) (Verizon Nov. 1 *Ex Parte* Letter) (describing Verizon's VoiceWing service); Letter from Cronan O'Connell, Qwest, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 03-211 (filed Sept. 27, 2004) (Qwest Sept. 27 *Ex Parte* Letter) (describing Qwest's VoIP architecture and service); Letter from Judy Sello, AT&T, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 03-211 at 1-4, (filed Oct. 21, 2004) (AT&T Oct 21 *Ex Parte* Letter) (describing AT&T's CallVantage service); Letter from James K. Smith, Executive Director -- Federal Regulatory, SBC, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 03-211, 04-29, 04-36, Attach. at 4-11 (filed Oct. 8, 2004) (SBC Oct. 8 *Ex Parte* Letter) (describing SBC's VoIP architecture and service); Letter from Glenn T. Reynolds, Vice President -- Federal Regulatory, BellSouth, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 03-211, 04-36, Attach. at 6-12 (filed Oct. 26, 2004) (BellSouth Oct. 26 *Ex Parte* Letter) (describing BellSouth's VoIP architecture and service); Letter from Glenn T. Reynolds, Vice President -- Federal Regulatory, BellSouth, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 03-211, 04-36, Attach. at 4 (filed Oct. 7, 2004) (BellSouth Oct. 7 *Ex Parte* Letter) (describing BellSouth's VoIP architecture and service); Letter from Howard J. Symons, Counsel for National Cable & Telecommunications Association (NCTA), to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 03-211, 04-36, Attach. at 3-5 (filed Oct. 28, 2004) (NCTA Oct. 28 *Ex Parte* Letter) (describing cable VoIP architecture). [**\*49**]

n94 See *American Libraries Ass'n v. Pataki*, 969 F. Supp. 160, 170 (S.D.N.Y. 1997) ("Internet protocols were designed to ignore rather than document geographic location.").

n95 We acknowledge that certain geolocation products may be capable of identifying, to some degree, the geographic location of a Vonage user in the future, see, e.g., Sprint Reply at 7, but the record does not reflect that such information is readily obtainable at this time. See, e.g., 8x8 Comments at 14-15. Should Vonage decide in the future to incorporate geolocation capabilities into its service to facilitate additional features that may be dependent on reliable location determining capabilities, e.g., E911-type features or law enforcement surveillance capabilities, this would not alter the fact that the service enables the user's location to change continually. See Vonage Oct. 19 *Ex Parte* Letter at 3-6 (explaining how user location information for emergency services purposes would have no relevance to an end to end jurisdictional analysis for DigitalVoice).

n96 See *Pulver*, 19 FCC Rcd at 3320-21, para. 21 ("Attempting to require *Pulver* to locate its members for the purpose of adhering to a regulatory analysis that served another network would be forcing changes on this service for the sake of regulation itself, rather than for any particular policy purpose."). [**\*50**]

n97 See, e.g., Letter from Staci L. Pies, The VON Coalition, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 01-92; WC Docket Nos. 02-361, 03-211, 03-266, 04-36, Attach. at 1 (filed Aug. 19, 2004) (VON Coalition Aug. 19 *Ex Parte* Letter).

26. In the absence of a capability to identify *directly* DigitalVoice communications that originate and terminate within the boundaries of Minnesota, we still consider whether some method exists to identify such communications *indirectly*, such that Minnesota's regulations

could nonetheless apply to only that "intrastate" usage such as voice calls between persons located in the same state. n98 For example, assume Minnesota were to use DigitalVoice subscribers' NPA/NXXs as a proxy for those subscribers' geographic locations when making or receiving calls. If a subscriber's NPA/NXX were associated with Minnesota under the NANP, Minnesota's telephone company regulations would attach to every DigitalVoice communication that occurred between that subscriber and any other party having a Minnesota NPA/NXX. But because subscribers residing anywhere could obtain a Minnesota NPA/NXX, a subscriber may never be present in Minnesota when [\*51] communicating with another party that is, yet Minnesota would treat those calls as subject to its jurisdiction. n99

n98 Where the Commission has found it difficult to apply an end-to-end approach for jurisdictional purposes, it has proposed or adopted proxy or allocation mechanisms to approximate an end-to-end result. See, e.g., *GTE ADSL Order*, 13 FCC Rcd at 22479, para. 23 (applying the 10% rule for determining interstate jurisdiction for federal tariffing purposes); *IP-Relay Second FNPRM*, 17 FCC Rcd at 7784, para. 15 (proposing either an allocator to approximate the mix of interstate/intrastate traffic or a user self-identification mechanism to identify its end-point location); *2004 IP-Relay FNPRM*, 19 FCC Rcd at 12561-64, paras. 221-30 (proposing either user-registration or allocation mechanisms to determine interstate or intrastate use; asking whether, in the alternative, all IP-Relay calls should simply be deemed interstate). We find a 'percentage' proxy to be unhelpful in addressing the conflict between the federal and state regulatory regimes (in particular, the tariffing and certification requirements) at issue in this proceeding, because using such a proxy would not avoid frustration of the Commission's policy objectives discussed above. See *supra* section III.A.3. But see, e.g., MTA Comments at 10. [\*52]

n99 In this example, if we further assume Minnesota requires entry certification for Vonage, but has an entry condition that Vonage cannot meet, Vonage could be subject to state sanctions for "operating" in the state without authority to the extent any of its customers nationwide obtain Minnesota NPA/NXXs and use the service to communicate with someone in Minnesota even though that subscriber never had a physical presence in Minnesota.

27. Similarly, if a Minnesota NPA/NXX subscriber residing in Minnesota used its service outside the state to call someone in Minnesota, that call would appear to be an intrastate call when it is actually interstate. Some commenters suggest that because Vonage markets DigitalVoice to provide "local" and "long distance" calls it surely has an ability to distinguish between intrastate and interstate calls. n100 These commenters fail to recognize that these calls are not "local" and "long distance" in the sense that they are for traditional wireline telephone services. Rather, like we have seen with the proxy example above, Vonage describes these calling capabilities for convenience in terms that its subscribers understand. A DigitalVoice call that [\*53] would be deemed "local," for example, is actually a call between two NPA/NXXs associated with particular rate centers in a particular state, yet when the actual communication occurs one or both parties can be located outside those rate centers, outside the state, or even on opposite ends of the world.

n100 See, e.g., NASUCA Reply at 15.

28. We further consider whether Minnesota could assert jurisdiction over DigitalVoice communications based on whether the subscriber's billing address or address of residence are in Minnesota. This too fails. When a subscriber with a Minnesota billing address or address of residence uses DigitalVoice from any location outside the state to call a party



located in Minnesota, Minnesota would treat that communication as "intrastate" based on the address proxy for that subscriber's location, yet in actuality it would be an interstate call.  
n101

n101 In this example, if we further assume Minnesota has imposed a specific rate requirement on DigitalVoice's intrastate communications, this rate requirement would apply to all DigitalVoice communications made by that subscriber to someone in Minnesota even though many of those communications are interstate under the Act. **[\*54]**

29. These proxies are very poor fits, yet even their implementation would impose substantial costs retrofitting DigitalVoice into a traditional voice service model for the sole purpose of making it easier to apply traditional voice regulations to only a small aspect of Vonage's integrated service. n102 Forcing such changes to this service would greatly diminish the advantages of the Internet's ubiquitous and open nature that inspire the offering of services such as DigitalVoice in the first instance. n103 Indeed, Vonage would have to change multiple aspects of its service operations that are not nor were ever designed to incorporate geographic considerations, including modifications to systems that track and identify subscribers' communications activity and facilitate billing; the development of new rate and service structures; and sales and marketing efforts, n104 just for regulatory purposes. n105 The Commission has previously recognized the significant efforts and inefficiency to attempt to separate out an intrastate component of other services for certain regulatory purposes where the provider, like Vonage here, *had no service-driven reason to incorporate such capability into* **[\*55]** *its operations*. n106 We have declined to require such separation in those circumstances, treating the services at issue as jurisdictionally interstate for the particular regulatory purpose at issue and preempting state regulation where necessary. n107 For example, in preempting a state regulation specifying default per line blocking of a customer's "Caller ID" for intrastate calls based on "impossibility," the Commission found that "we need not demonstrate absolute future impossibility to justify federal preemption here. We need only show that interstate and intrastate aspects of a regulated service or facility are inseverable as a practical matter in light of prevailing technological and economic conditions."  
n108

n102 See *Pulver*, 19 FCC Rcd at 3321-23, paras. 22, 24 (finding it similarly impossible to separate *Pulver's* VoIP service).

n103 See, e.g., Vonage Oct. 19 *Ex Parte* Letter at 6.

n104 In reviewing a challenge to a Commission requirement for BOC joint CPE/service marketing because it would "surely 'affect' charges for" and regulate "intrastate communications services," and preemption of inconsistent state regulation, the D.C. Circuit affirmed the Commission stating that "even if [it] were a purely intrastate service, the FCC might well have authority to preemptive regulate its marketing if -- as would appear here -- it was typically sold in a package with interstate services. Marketing realities might themselves create inseparability." *Illinois Bell Tel. Co. v. FCC*, 883 F.2d 104, 112-13 & n.7 (D.C. Cir. 1989) (referencing *Louisiana Pub. Serv. Comm'n*, 476 U.S. 355). **[\*56]**

n105 See generally Vonage Oct. 19 *Ex Parte* Letter.